JD(SF)-33-17
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CINELEASE, INC.

And **Cases 31-CA-166005**
31-CA-167675
STUDIO TRANSPORTATION DRIVERS, LOCAL 399 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS **31-CA-164872**

Yeerik Moy, Esq.,
Rudy L. Fong Sandoval, Esq.,
James Racine, Esq.
for the General Counsel.
Bonnie Glatzer, Esq.,
Irene Scholl-Tatevosyan, Esq.,
Nixon Peabody, LLC,
for the Respondent.
Ryan Spillers, Esq.,
Gilbert & Sackman,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on April 4–6, 2017. The Studio Transportation Drivers, Local 399 of the International Brotherhood of Teamsters (Charging Party or Union) filed charges and amended charges between December 11, 2015, and April 28, 2016.[1] The General Counsel issued the amended consolidated complaint at issue here on March 20, 2017. Cinelease, Inc., (the Respondent) filed a timely answer denying all material allegations.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: rechecking employees' work authorization documents and telling employees they were doing so; requiring employees to provide additional work authorization

[1] All dates are in 2015 unless otherwise indicated.

documentation; interrogating employees about whether anyone from the Union had approached them; soliciting complaints and grievances and promising increased benefits and improved terms and conditions of employment if they refrained from organizational activity; threatening employees with discipline/termination if they supported the Union; and making implied threats of job loss and lower wages by distributing a document entitled "Cinelease personal guarantees". The complaint alleges the Respondent violated Section 8(a)(3) and (1) of the Act by placing employee Hugo Martinez on a leave of absence. Finally, the complaint alleges that a majority of the employees in the bargaining unit signed union authorization cards, and the General Counsel seeks a bargaining order.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Nevada corporation with an office and place of business in Los Angeles, California, is engaged in the business of business of motion picture equipment rentals of lighting and grip equipment, and sales of expendable supplies. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background and the Respondent's Operations

Cinelease, with approximately 165 employees, has about 10 locations throughout the United States, and one in the United Kingdom. (Tr. 467, 498.)[2] During all relevant times, Steven Ortiz (Ortiz) has been the vice president and general manager, Jorge Mendoza (Mendoza) the operations manager, and Joe Ball (Ball) the director of sales for Cinelease.

Hertz Corporation purchased Cinelease in 2013. Herc Rentals was previously part of Hertz Corporation. Herc was spun off and Cinelease became part of Herc. (Tr. 462–463.) Angela Johnson (Johnson) is Herc Rentals' regional human resources partner for the west, with oversight of Cinelease. Human Resources (HR) is centralized, and serves all Cinelease locations. (Tr. 499, 514.) Since about June 2013, Kristine Stepanyan (Stepanyan) has been the human resources employee in charge of Cinelease. Her duties include ensuring employees have proper work authorization papers, which she maintains in her office. (Tr. 499–500.) Hertz uses

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit;" "CP Exh." for the Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R Br." for the Respondent's brief, and "CP Br." for the Charging Part's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record.

e-verify and a system called ICIMS to recheck employee work authorizations. These systems were not imported to Cinelease when Hertz purchased it. (Tr. 463–464.)

The warehouse workforce at Cinelease largely consists of immigrant employees. (Tr. 507–508; CP Exh. 8.) During the relevant time period, there were 42 warehouse employees. (CP Exh. 8.) Warehouse workers frequently talked to each other about various topics during the work day. (Tr. 251–252, 292.)

B. Initial Union Organizing Activity

The Union represents the Cinelease's drivers. Cinelease warehouse employees attempted to organize with a different union, the Local 80, in 2009. Around the time of that organizing drive, Cinelease laid off four employees who supported the union, citing a slowdown of business. (Tr. 146–147, 450.)

A group of warehouse employees approached the Union in June 2015. (Tr. 29, 209.) Ernie Barazza (Barazza), a business agent for the Union, oversaw the organizing campaign. A volunteer organizer, Victor Morante (Morante), helped Barazza. (Tr. 30.) About 25 warehouse employees attended the first union meeting. (Tr. 30.) Barazza had authorization cards available on a table, and explained that signing the cards meant they wanted the Union to represent them. (Tr. 31, 35–36.) The cards state:

> I, the undersigned employee of (Company) . . . authorize Teamsters Local 399 to represent me in negotiations for Pension and Health Benefits. I further understand that the signing of this authorization is the same as a vote for the union and that if enough cards are signed Local 399 may become the bargaining agent and Union at my place of employment without an election.

Thirteen employees signed cards at the initial meeting. (GC Exh. 2; Tr. 7.)

Barazza's outreach efforts to organize workers included speaking to workers during lunch breaks. Employees and Morante visited warehouse employees at their homes. (Tr. 41, 72, 88.) Barazza answered questions from warehouse employees on a variety of topics. (Tr. 44.) The Union continued to hold meetings during the summer of 2015. (Tr. 43.)

As of August 14, 22 warehouse employees had signed union authorization cards. (GC Exhs. 1–4; Tr. 152, 199, 287.)

C. Conversation between Mendoza and Tolentino

In or around November 2015, at about 11:00 a.m., Jose Fernando Tolentino Chavez (Tolentino) received an instruction from his supervisor, Alfredo Delarosa (Delarosa), to go to Mendoza's office. Delarosa walked with Tolentino to Mendoza's office. Once there, Mendoza asked Tolentino what Cinelease could do to improve working conditions or benefits for employees. Tolentino suggested that instead of having an employee of the month, Cinelease could give a bonus to each employee at the end of the year. Mendoza said "Let's see what we can do about that." Mendoza told Tolentino he had heard that some of the employees wanted to

form a union, and asked if anyone had approached him with a card. Tolentino replied that nobody had approached him.[3] Mendoza told Tolentino his door was always open for anything he needed. Tolentino had never met with Mendoza one-on-one before. (Tr. 106–108.) Mendoza denied the meeting took place in November. (Tr. 331.)

D. Election Petition and Meetings with Labor Consultant

During a meeting in November, the employees in attendance decided they wanted to file an election petition. (Tr. 37.) The Union filed a petition for representation with the Board on November 24. 2015. The stipulated election agreement defined the following unit as appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time warehouse employees, including lighting technicians, grips, repair employees, HMI employees, electric employees, cable employees, Kino employees, personal cages keepers, and expendables employees, employed by the Employer at its facility located at 5375 West San Fernando Road, Los Angeles, California 90039.
>
> Excluded: All other employees, office clerical employees, including rental and sales clerical employees, confidential employees, custodians, drivers, dispatchers, managerial employees, foremen, employees of a temporary agency, and guards and supervisors as defined in the Act.

(CP Exh. 1). Barazza filed the petition and turned in signed authorization cards. (Tr. 37–38.)

During the first two weeks of December, a labor consultant, Alex Casillas (Casillas), held meetings with the employees to persuade them not to bring in the Union. Natasha Peiris (Peiris), a human resources employee for Hertz, was present for these meetings. (Tr. 377.) Peiris was not usually physically present at Cinelease, but was there regularly during the organizing campaign, in November and December. (Tr. 133, 173, 376.) Employees were put into groups of 5–8 per meeting and attended 3–4 meetings, each lasting about an hour. (Tr. 122, 171, 289.) Tolentino, Jose Fernandez (Fernandez), Jose Robles (Robles),[4] and Wilson Flores (Flores) recalled Casillas telling the employees that a union contract would contain and 8-point attendance system, and that any employee who accumulated 8 points would be fired. (Tr. 123, 171–172, 274, 277, 290.) Tolentino also recalled Casillas stating that if the Union needed them to go on strike, the employees would only be paid $100 per week, and from that $100 they would have to pay union dues. (Tr. 134.) He further recalled Casillas stating that if the Union won the election, there was no way to know what benefits they would have because Cinelease would have to bargain with the Union. (Tr. 144.)

Warehouse employee Segundo Zambrano recalled that Casillas compared the Cinelease drivers' contract to their contract, and said the employer and the Union would meet to find a new

[3] Tolentino had in fact signed a card on June 19, but was afraid of reprisal so said he had not signed a card. (Tr. 142.)

[4] Robles worked in the warehouse at Cinelease from September 2014 through August 2016. (Tr. 284.)

contract. Unprompted, Zambrano volunteered that Casillas never said they would have the 8-point attendance system. (Tr. 438.)

Johnson attended some of the meetings, and heard Casillas tell employees that if they got a contract, it may include an 8-point attendance policy like the drivers' contract.[5] (Tr. 470–471.)

E. Work Authorization Rechecks and Martinez' Suspension

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to verify the identity and employment eligibility status of any person hired. IRCA's I-9 form describes the types of documents an employer may accept for verification purposes. An employer is required to record on the I-9 form the issuing authority and expiration date for the documents produced.[6] Criminal penalties may be assessed when investigators discover a pattern or practice of intentionally or negligently failing to comply with I-9 requirements. These penalties usually do not apply to first-time offenders. Fines range from $100 to $1,100 per unverified form depending on the severity of the violation. (Tr. 391–393.) The status of being a lawful permanent resident, or "green card" holder, does not expire. Employers are not permitted to re-verify the work authorization status of a green card holder.

On December 4, after one of the meetings with Casillas, employee Roberto Saldana told Mendoza that his coworker Hugo Martinez' (Martinez) work permit had expired.[7] (Tr. 313.) Casillas also told Johnson that he had learned there may be an employee with expired documents. (Tr. 473–474.) Saldana told Mendoza he was upset with Martinez because Cinelease had previously gone out of its way to do things for Martinez and now he wanted to bring in the Union. (Tr. 334.) Mendoza informed Ortiz, and they called Johnson from human resources. (Tr. 314.) Ortiz recalled the initial chain of events somewhat differently. According to Ortiz, he came into Mendoza's office after a meeting and there was a conversation going on about the possibility of an employee with expired work authorization. He thought maybe Johnson or Peiris was also in Mendoza's office. (Tr. 488–489, 493.) Johnson recalled that she approached Ortiz to let him know Casillas had told her an employee had mentioned during a meeting that an employee had invalid work authorization. (Tr. 473–476.) Prior to checking to see if Martinez' work authorization had expired or otherwise investigating the matter, they decided to call Cinelease's attorney, Jeff Pegula.[8] (Tr. 314, 474, 498.) Pegula told them to conduct an audit of all employees to verify everyone's documentation. (Tr. 315, 489.)

On behalf of Pegula, Bob Dolinko, a labor and employment law specialist at Nixon Peabody, contacted Courtney New, an immigration law specialist at the firm, and the three of them participated in a phone call on December 4. Pegula asked what he should do after discovering that there was not a procedure in place to re-verify employment documentation. New

[5] Johnson is not fluent in Spanish, so she could not have known what he said in the meetings he conducted in Spanish. (Tr. 480.) She initially pretended not to know why Cinelease hired Casillas, but eventually acknowledged he was "probably" advocating against the Union. (Tr. 481–483.)

[6] CP Exh. 9 is a blank I-9 form.

[7] Mendoza did not recall the specific date but thought it was around December 1. The evidence shows, however, that the phone calls to the attorneys occurred on the same day, and New's billing records reflected that date was December 4. (Tr. 385.)

[8] Mendoza later did not recall if he and Ortiz reached out to Johnson or Pegula first. (Tr. 340–341.)

advised Pegula that Cinelease should look at I-9 forms across the board, determine whether any employees had expired documents, and obtain updated documents where needed. (Tr. 385–387.) New and Pegula "talked specifically about documents that indicate that an individual's employment authorization is or has expired need to be reverified, but not all documents that someone might have presented would need to be reverified." She did not specify which documents would need to be re-verified. (Tr. 400–402.)

New advised that the documentation should be provided within a week, and any individuals who could not provide current documentation could not continue employment. Pegula told New about the union campaign, and she said that it did not change her advice. (Tr. 388–389.)

Ortiz met with Stepanyan and asked her to go through all of the I-9 forms and separate out the ones that were not current. Stepanyan was instructed to bring Johnson and Ortiz a list of names of employees whose documentation had expired. Ortiz asked Stepanyan whether she had been updating work authorizations prior to December 2015, and Stepanyan said she had only been making sure the drivers had current licenses and medical cards. (Tr. 466–468.) Human Resources conducted the audit and, on about December 4, gave Mendoza a list of employees whose documents had expired. (Tr. 315–318, 466, R Exh. 3.)

The audit was done on a corporate-wide basis. (Tr. 349, 372–373; CP Exh. 7.) Out of Cinelease's 165 employees, 17 were identified as having expired work papers. Seven of these were warehouse employees. (R Exh. 3; GC Exh. 5.) Starting at around 9:00 a.m. on December 4, Mendoza called in all of the 17 employees on the list. (Tr. 318, 357.)[9]

At about 1:00 p.m. on December 4, 2015, Tolentino was instructed to go to Vasquez' office. When he arrived, Mendoza was present, along with Peiris. Mendoza, translating Peiris' words into Spanish, asked Tolentino to bring in his work permit because the one Cinelease had was expired. The next working day, Tolentino brought in his permit and Mendoza made a copy of it. Tolentino's work permit expires every 18 months. Prior to December 2015, Tolentino was asked to provide updated documentation in 2007 and 2011.[10] In 2007, he brought his updated documentation in the week following the request for it. (Tr. 111–113.) Tolentino discussed the December 4 meeting with coworkers Hugo Martinez, Fernandez, and Flores. Martinez was fearful because his work permit had expired. (Tr. 115, 211–212.)

Jose Fernandez was asked to provide documentation of his work status when he was hired in 2004. He was asked to update his documentation in 2011.[11] At the time, Fernandez told human resources he was waiting for his resident's card in the mail, and he provided it when it arrived a week or two later. (Tr. 154–156, GC Exh. 7.) On December 4, 2015, at around 3:00

[9] On an undetermined date, Barazza received a phone call from a committee member reporting that a supervisor had told him Cinelease was going to start checking immigration papers. At the employees' request, Barazza held a meeting where employees expressed concern about the rumors that immigration papers would be checked. (Tr. 47–48.)

[10] He had not voluntarily updated his work permit. (Tr. 145.)

[11] On direct examination, Fernandez could not recall whether he was asked to update his documentation in 2010 or 2011. His recording close to the time of his meeting with Mendoza, shows that Mendoza said he had not updated his documentation since 2011. (GC Exh. 7.)

p.m., Portillo paged Fernandez to the front office. Fernandez was walked to a meeting with Mendoza and Peiris. Mendoza asked to see Fernandez's resident card. Fernandez said his card was at home and he would bring it in on Monday, the following business day. (Tr. 158–161.) Fernandez' resident card lasts 10 years, and had not expired. The card he brought in on December 7 was the same card Cinelease already had on file. (Tr. 167.)

Mendoza checked Zambrano's work authorization papers in December 2015. (Tr. 437.) Zambrano is a United States citizen. Management knew he had become a permanent resident several years earlier. When his status changed to permanent resident, Cinelease stopped checking his authorization papers.[12] (Tr. 440–441.)

Victor Hernandez provided updated authorization documents in December 2015. (Tr. 457.) Robles, who had an expired work permit, was not called into the office for a recheck. (Tr. 295.)

Hugo Martinez was hired in the warehouse in 2010 as a temporary employee, and became permanent in 2012. He provided a copy of his work permit to Cinelease in 2012 but had not since updated it. It had expired around August 2013. (Tr. 208–209, 219.) On December 7, Mendoza called Martinez into a meeting in his office. Peiris was also present, and she informed Martinez that Cinelease was rechecking work permits, and his had expired. Martinez was told to bring updated documents to work the following day. The next day, Martinez was called into Mendoza's office and he told Mendoza and Peiris he did not have work papers. Peiris told him he could not work at Cinelease until he had his work permit updated. Mendoza told Martinez to return on December 18 to see if Cinelease could help him.[13] (Tr. 213–216, 320.) Martinez worked his entire shift on December 8. (Tr. 234.)

Word about Martinez's removal spread among the warehouse employees within a couple of days.[14] (Tr. 256, 269, 294.) Martinez's removal caused other employees to be fearful. (Tr. 52, 223, 257–258, 271, 303.) Tolentino was fearful after Martinez was told he could not return to work. He recalled that in 2009 when there was an organizing drive, four employees were removed for reasons other than expired work permits. Tolentino believed Cinelease was requesting documentation in reprisal for workers' union activity, and he was worried he would be let go for any mistake. (Tr. 120–121, 138–139.) Sergio Nava shared this fear.[15] (Tr. 258.) Flores, who is a United States citizen, also felt scared, and asked Barazza if the election could be postponed because he and his coworkers were scared. (Tr. 269.) Robles was scared of losing his job. (Tr. 296.) Following Martinez's departure, Tolentino did not talk to coworkers about the Union anymore because he was fearful. (Tr. 132.)

Following the rechecks, participation in union meetings declined.[16] (Tr. 53, 71, 130.) Tolentino, who had been on the organizing committee, started to avoid Barazza, and employees

[12] Zambrano could not recall exactly when he became a permanent resident. He was shown a resident card with his name on it, but would not testify it was his. (CP Exh. 13.)

[13] Martinez conveyed this to Barazza. (Tr. 52.)

[14] Omar De Pas was not aware that work reauthorization papers were checked in December 2015. (Tr. 449.)

[15] Nava worked in the warehouse at Cinelease from 2013 until September 2016

[16] Tolentino recalled there was one meeting after the election that 8 employees attended. (Tr. 137.)

who had supported the Union began avoiding him. (Tr.54–57.) Support for the Union went from being very strong to employees being fearful. (Tr. 60–64, 226, 229.) Two employees told Nava that they felt like they were not going to vote for the Union because of what happened to Martinez. (Tr. 263.)

Nobody from management provided assurances that Martinez' removal was not related to union organizing. (Tr. 262.) Management did not provide any employee verbal or written assurances that the rechecks had nothing to do with the upcoming election. (Tr. 512–513.)

F. December 16 Meeting and Cinelease Personal Guarantees

On December 16, the day before the election, Ortiz, Mendoza, Ball, and Casillas conducted a meeting with the warehouse employees. (Tr. 124–125, 510.) Ortiz spoke in English and Mendoza translated. Tolentino recalled that Ortiz made a gesture of his hands being tied, and said that was how it would be if the Union came to Cinelease— "the good employees accumulated eight points, they will be fired and they won't be able to do anything for us to stay in Cinelease." (Tr. 125–126.)

Ortiz went through a PowerPoint presentation describing Cinelease's view of the benefits of voting non-union. (CP Exh. 5; Tr. 510.) Management distributed a flyer entitled "Cinelease Personal Guarantees" which stated:

> The NLRB says we cannot make unlawful promises to you during this certification campaign. However, in response to your questions and comments, we are allowed to assure you that remaining union-free will not cause you to lose what you currently enjoy.
>
> Cinelease makes the following personal guarantees to employees voting in the upcoming NLRB conducted certification election. If the Cinelease Warehouse workers remain union free.
>
> 1. Cinelease guarantees that you will not lose your job because you decide to stay union-free.
>
> 2. Cinelease guarantees that no matter what the union or its supporters may have said, no employee will be disciplined or terminated for supporting the union by:
>
> - Signing a union authorization card.
> - Attending union meetings.
> - Expressing support for the union.

Fernandez stated in his affidavit that about 21 employees attended this meeting. (Tr. 178.) Martinez recalled 7 or 8 people at the meeting. (Tr. 227.) Nava believed about 8 employees attended after Martinez was removed. (Tr. 259–260.)

> 3. Cinelease guarantees that we will continue our open door policy as we have successfully done in the past for our non-union employees to promptly solve employee problems, allow employees to be heard, and make Cinelease an even better place to work.
>
> 4. Cinelease guarantees that management will continue its existing practice of personally meeting with any employee who believes they have been treated unfairly or have a problem they wish to discuss.
>
> 5. Cinelease guarantees that you will not have your existing pay rates reduced because you decide to stay union-free.
>
> These guarantees reflect what you have now and our current policies. You will not lose these items because you choose to remain union-free.

The flyer was notarized, and was signed by Ortiz, Mendoza, and Ball. (GC Exh. 6.)

G. The Election

The election occurred on December 17. Martinez was permitted to vote in the election. (Tr. 79.) Out of 42 eligible voters, 21 votes were cast for the Union and 21 votes were cast against the Union, with no challenged ballots.

On December 18 at 4:30 p.m., Martinez called Mendoza as he had been instructed to do. Mendoza told Martinez he could take more time, and could use his vacation time if he wanted to be paid. Martinez has not been terminated from Cinelease. Mendoza recalled that during one phone conversation, Martinez said he was not going to be able to get his work authorization. (Tr. 218–219, 321; R Exhs. 1, 4–5.)

H. Employee Testimony on Interactions Regarding the Union

Morante visited the home of employees Sandro and Victor Hernandez in early December. Victor came outside to talk to Morante, and asked him what the Union was going to do about Martinez. Victor said he was scared and did not know if he was going to vote for the Union. (Tr. 92–95.)

Jose Vasquez felt pressured in April or May when Jose Chavez and Hugo Martinez approached him twice and asked if he would sign an authorization card. (Tr. 408–409.) In September, Nick Sanchez made a gesture of pointing to his privates when Vasquez walked by. Vasquez said that gesture in Latin culture means "I'm going to hit your neck." (Tr. 412–414.) A few weeks before the election, Sanchez followed Vasquez to his car. He also found his lunch that was in the refrigerator slashed. Vasquez believed there were cameras in the lunchroom, but he never found out who slashed his lunch. (Tr. 419–421.)

On a weekend day in mid-November, before the election, Chavez called Vasquez and said he was having car trouble. They live three houses away from each other, so Vasquez went over to Chavez's house to try to help. Flores came out of Chavez' house with a card and said he wanted Vasquez to sign it. Flores said that if Chavez would not sign the card, he was going to

accuse him of sexual harassment. He apologized on Monday (Tr. 409–411.) A couple weeks before the election, Vasquez received calls at home and the caller hung up when the phone was answered. (Tr. 422–423.) Vasquez feared signing a card because he had recently started at Cinelease, and had previously been unemployed and trying to survive with his wife and son. (Tr. 425.)

Zambrano has worked for Cinelease for 18 years. When he walked by Sanchez and Flores, he perceived gestures such as walking near each other, pushing each other, laughing and shaking hands as indicating a lack of respect. (Tr. 433–434.) No employee or union representative talked to him about the Union during the campaign or tried to persuade him to sign an authorization card. (Tr. 439.)

De Pas was given a card by coworker Javier Madrigal. When Madrigal asked him to sign for the Union, De Pas said, "Fuck no." (Tr. 447.)

Sanchez told Alfredo Hernandez he wanted to hit him. Sanchez had the nickname "little gun." Sanchez also said he could fire Hernandez and raised his hand with his fist closed. (Tr. 455–457.) Sanchez did not try to give Hernandez an authorization card.[17] (Tr. 459.)

III. Decision and Analysis

A. Witness Credibility

Some of the disputes at issue can be resolved only by assessing witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, *Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp*., 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify);

[17] Mendoza testified that Sandro Hernandez reported that Jaime Monge approached him at work to sign a union card and felt threatened because he was told he could lose his job if he did not sign, and that . Monge was written up. (Tr. 329–330.) This hearsay testimony could have easily been corroborated by submitting the discipline, but it was not, and is therefore given little to no weight.

Flexsteel Industries, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises, Inc*., 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, *Inc.*, 197 NLRB 489, 491 (1972).

It is impossible to reconcile all of the different recollections of the witnesses for both sides. In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g. *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below.

B. Section 8(a)(1) Allegations

1. General Legal Principles

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct would reasonably tend to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, *Inc.*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147(1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

It is the General Counsel's burden to prove Section 8(a)(1) allegations by a preponderance of the evidence. 29 U.S.C. § 160.

2. Alleged interrogation and solicitation of grievances by Jorge Mendoza

Complaint paragraphs 7 and 17 allege the Respondent violated Section 8(a)(1) of the Act when, in November 2015, Jorge Mendoza interrogated Jose Tolentino about whether he had been approached by the Union, and solicited employee complaints and grievances from him.

a. Credibility

To resolve this complaint allegation, it is necessary to assess witness credibility, as Tolentino's and Mendoza's testimony conflicts. I credit Tolentino's account of the meeting for many reasons. First, Tolentino offered a detailed a specific account of what occurred at the meeting. He recalled how he was approached about the meeting, the time of day, how he was escorted to the meeting, the specific topics discussed, and the location and length of the meeting, as detailed above. His testimony did not appear rehearsed and his demeanor was calm and straightforward.

Mendoza denied that a meeting with Tolentino occurred in November 2015. I do not credit this denial for the following reasons. First, Mendoza's account of other events during the same time period is at odds with other witness' recollections. For example, Mendoza recalled that he was approached by Saldana about Martinez' work authorization on around December 1, and he Mendoza "went over to report it over to Steve Ortiz" and they decided to call human resources (Tr. 314–315.) Ortiz, on the other hand, recalled that he came to Mendoza's office after a meeting, and came upon a discussion about Martinez between Mendoza and either Johnson or Peiris from human resources. (Tr. 488–489.) Mendoza initially testified that he and Ortiz reached out to Johnson before they talked to Pegula. (Tr. 314.) He later could not recall whether he and Ortiz first reached out to Johnson or Pegula. (Tr. 340–341.) Given Mendoza's problems accurately recalling what occurred in early December, I decline to credit his blanket denial of a meeting with Tolentino, particularly in light of Tolentino's specific and detailed testimony. As a current employee testifying against his own pecuniary interests, I find Tolentino's testimony particularly reliable.

In addition, I find that the Respondent's failure to call supervisor Delarosa, who Tolentino said approached him about the meeting and walked him to Mendoza's office, to corroborate Mendoza's testimony warrants an adverse inference. See *Roosevelt Memorial Medical Center*, supra.

The Respondent also contends that Tolentino's testimony is doubtful, since it is unlikely that Mendoza would have questioned only him if he wanted to learn about employees' union activity. The questioning need not have been widespread, however, for it to constitute an unlawful interrogation, as discussed below.

b. Alleged interrogation

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir.

1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005).

The Board also considers the timing of the interrogation and whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954). These factors "are not to be mechanically applied," they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, fn. 20. The Board has held that interrogations that constitute "a pointed attempt to ascertain the extent of the employees' union activities" are unlawful. *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001).

With regard to the alleged interrogation, I find the totality of the circumstances compels a finding that Tolentino was interrogated. The nature of the information sought went to the heart of Tolentino's and other employees' union activity. The interrogator was the highest ranking management official at the warehouse, and the questioning took place behind closed doors. As to the truthfulness of the reply, Tolentino withheld the truth because he feared retaliation.

The Respondent cites to *Temp Masters, Inc*., 344 NLRB 1188 (2005), to support its contention that Mendoza's actions were not coercive because he did not seek information upon which to take action against employees and he did not seek to determine the views of employees.[18] I find *Temp Masters* to be meaningfully distinguishable, because it involved a question to an employee about whether a union representative merely had visited the jobsite. Here, the question was whether Tolentino himself had been approached to sign an authorization card. This is much more pointed and personal than the question in *Temp Masters*, and it is easy to see how a truthful answer would result in Tolentino disclosing his union sympathies. Moreover, the employee in *Temp Masters* was not called into a one-on-one meeting behind closed doors, and promised benefits, as detailed below.

To the extent the Respondent argues that seeking information upon which to take action against employees is a required element to prove an unlawful interrogation allegation, the Board's caselaw demonstrates no such *per se* requirement. See, e.g., *Rossmore House*, supra. The same holds true for any assertion that an interrogation needs to take place during the critical period for it to rise to the level of a Section 8(a)(1) violation. Considering the totality of the circumstances, with particular emphasis on the pointed personal nature of the inquiry in the context of a closed door meeting with a high-level manager, I find the General Counsel has met his burden to prove the unlawful interrogation occurred as alleged.

[18] The Respondent also cites to *NLRB v. Champion Laboratories, Inc*., 99 F.2d 223 (7th Cir. 1996), however that decision denied enforcement of the Board's decision finding an unlawful interrogation in *Champion Laboratories*, 316 NRLB 1133 (1995).

c. Alleged solicitation of grievances/promise of benefits

Employer solicitation of employee grievances or complaints during an organizing campaign may be considered as an implied promise to resolve complaints elicited favorably for the employees. See *Alamo Rent-A-Car*, 336 NLRB 1155 (2001). In *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001), the Board, quoting *Maple Grove Health Care Center*, 330 NLRB 775 (2000), stated:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. . . .[I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is [sic] rebuttable one.

See also *Reliance Electric Co.*, 191 NLRB 44, 46 (1971) (employer soliciting complaints, where it has not done so in the past, raises "compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.")

An employer with a past practice of soliciting employee grievances may continue to do so during an organizing campaign as long as the practice remains essentially the same. It is the Respondent's burden to establish the past practice. *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796 (2011).

In the instant case, I find the Respondent did not show that Mendoza calling a warehouse employee off the workroom floor into a closed-door meeting and specifically asking what the employer could do to improve working conditions was consistent with past practice. The evidence shows the opposite – Tolentino's only past meetings with Mendoza had been for his annual performance reviews, with human resources present.

During the closed-door meeting, when presented with Tolentino's concern, Mendoza said he would see what he could do about it. This is reasonably construed as an offer to remedy it.

The Respondent's references to an open door policy in its Cinelease Personal Guarantees document distributed to employees and Ortiz' engaging in banter every now and then with some of the guys at bowling nights in an effort to establish past practice are unpersuasive; they are not in the same ballpark as the direct solicitation present here.[19]

[19] To show it had an open door policy, the Respondent relies only on the reference to it in the Cinelease Personal Guarantees, which was distributed to employees on December 16. The parameters of any such open door policy are not apparent as the Respondent did not provide a copy of the policy or

The Respondent points to *Heartland of Lansing Nursing Home*, 307 NLRB 152, 156 (1992), quoting the administrative law judge's statement that "because it's not the solicitation of grievances but the promise to correct them that is coercive" there was no violation. This misstates the judge's conclusion, which was that there was a violation of Section 8(a)(1), despite the Respondent's effort to rebut the inference of the implied promise to correct grievances.[20] The Respondent also cites to *TNT Logistics North America, Inc.,* 345 NLRB 290 (2005), where the Board found the solicitation at issue occurred in a manner consistent with established past practice of soliciting employee concerns. Here, as stated above, the Respondent did not establish that Mendoza's solicitation was consistent with established past practice. Accordingly, I find the General Counsel has established an implied promise of benefits as alleged in the complaint.

3. Alleged threat of discipline by Alex Casillas

Complaint paragraphs 8 and 17 allege that the Respondent violated Section 8(a)(1) when Labor Consultant Alex Casillas threatened employees with discipline or termination if they supported the Union.

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire and Automotive Testing of Texas*, *Inc*., 308 NLRB 72 (1992). The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

In the context of an organizing campaign, determining whether a statement is an illegal threat as opposed to an opinion about the possible consequences of unionization has proven difficult. It must be assessed in a fact-specific manner, taking into account the employer's right to freedom of speech under Section 8(c) of the Act, balanced against the employees' right to be free from coercive threats under Section 7. The leading case on this subject is *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), where Supreme Court addressed this tension, stating:

> It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization

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evidence of how it operated as part of an established past practice.

[20] The Respondent also cites to *NLRB v. Rollins Telecasting, Inc*., 494 F.2d 80, 83 (2d Cir. 1974), but that case upheld the Board's finding of an 8(a)(1) violation based on veiled promises of benefits, and does not compel a different result here.

> will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

See also *National Propane Partners, L.P.*, 337 NLRB 1006, 1017 (2002).

The evidence shows that at least four employees, Flores, Fernandez, Robles, and Tolentino, heard Casillas state that they would have an 8-point attendance system if the Union won the election. Other employees heard Casillas state that there might be such an attendance system but the parties would need to bargain. It is undisputed that Casillas held multiple meetings and no witness except for Casillas himself was in all of these meetings.[21] Since the evidence of the four employees who heard Casillas state the 8-point attendance system was tied to the Union coming in as the employees' representative is unrefuted, I credit it. I note that three of these employees, Flores, Fernandez, and Tolentino, were still employed with the Respondent when they testified, rendering their testimony particularly reliable. Even though Robles no longer worked for the Respondent when he gave his testimony, there is no evidence he left Cinelease on sour terms, and his credibility was not otherwise undermined.[22] As he is no longer at Cinelease, he has no vested interest in whether the Union represents its warehouse employees, and I therefore find his testimony to be reliable.

The Respondent asserts that all of Casillas' meetings conveyed the same information, relying on Johnson's testimony and some PowerPoint presentations. (CP Exhs. 2–4.) Johnson admittedly did not attend all of the sessions, and she does not understand Spanish. She therefore lacks knowledge as to what was said at all of the meetings. The sum total of evidence regarding the PowerPoints Casillas used comes from Johnson's testimony:

> Q And did you know if he was working extemporaneously of off some type of script?
> A I think he had a rough script, draft that he used to make sure his PowerPoint was his bullet points, yes.
> Q So he worked off PowerPoints in each of the meetings?
> A Yes.

(Tr. 470.)

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[21] The Union submitted PowerPoint presentations that were provided by the Respondent in response to the Union's subpoena requesting all documents that Cinelease distributed to any bargaining unit employee in connection with the election. (CP Exhs. 2–4.) Peiris was in the meetings, but she did not testify as a witness at the hearing.

[22] The Respondent argues that Robles and Flores are not credible, pointing to the fact that they did not bring up the 8-point attendance system in their affidavits. Robles and Flores testified they were not asked about it when they provided their affidavits. (Tr. 274, 291.) Tolentino stated he did not tell the Board agent whether Casillas compared the drivers' contract to the warehouse workers' attendance policy because he did not remember it (Tr. 143), but this does not imply his testimony about what he heard Casillas say about an 8-point attendance system was untrue. Whether Fernandez was asked about the meetings by the Board agent(s) who took his affidavits is not a matter of record. Given the four employees' generally corroborative testimony, unrefuted by Casillas, I do not find the absence of this topic in the affidavit impugns their credibility.

> Q No? Can I direct your attention to Charging Party Exhibit 2, 3, and 4? Please let me know when you've had a chance to review -- you don't have to look through the whole thing, but I'll ask you this if you've had a chance to glance at them.
> A Yes, I've seen these before.
> Q Okay. These are the PowerPoint presentations that Alex was using during these meetings with employees that you described, aren't they?
> A They appear to be.

(Tr. 484.) Notably, the Respondent did not submit any evidence that Johnson attended the sessions that Flores, Fernandez, Robles, and Tolentino attended. With regard to the PowerPoints, there is no record evidence about who created them or whether they were presented to employees or used as a reference for Casillas. Assuming at least some of them were presented in some of the sessions, there is no evidence of how they were presented (i.e. a slide show, handouts, etc.), whether Casillas presented all of the topics appearing on the slides, or how much, if at all, he deviated from the PowerPoints. Notably, no warehouse employee testified about a PowerPoint presentation at the meetings with Casillas.[23]

The Respondent points out that Fernandez and Tolentino also heard Casillas say he did not know what would be in their contract if the Union prevailed. Even so, it is clear from the testimony of the four employees that they came away from the meeting believing that voting in the Union would result in the employer imposing the 8-point attendance system.

Relying on Johnson's testimony and the PowerPoints, as well as Zambrano's testimony, the Respondent also asserts that the weight of the evidence shows Casillas merely compared the drivers' attendance policy to the warehouse workers' attendance policy. There is no evidence Zambrano attended the same sessions as the aforementioned four employees. For the same reasons I found Johnson's testimony and the PowerPoints did not establish all of the meetings were the same, I find this evidence does not establish Casillas merely compared the drivers' policy to the warehouse workers' policy at each session he conducted.

It is curious that Casillas, the Respondent's agent who actually conducted each of the meetings and presented the information, was not called to testify. I find an adverse inference is appropriate, and infer that had Casillas been called to testify, he would state that he told some employees they would have an 8-point attendance system if the Union prevailed. *Martin Luther King, Sr., Nursing Center*, supra.[24] This is not a prediction "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" and I find it violates Section 8(a)(1). *Gissel*, supra.

4. Alleged threats by Steven Ortiz

Complaint paragraphs 9 and 17 allege the Respondent violated Section 8(a)(1) of the Act when Steven Ortiz, about December 16, 2015, at a staff meeting at the Facility: (a) threatened employees with discipline and/or termination if they supported the Union; (b) made implied

[23] For this reason, the Charging Party's arguments that the PowerPoints violate Section 8(a)(1), are unavailing. (R Br. 38–44.)

[24] I would come to the same conclusion without the adverse inference.

threats of job loss if the employees selected the Union by distributing the document titled, "Cinelease personal guarantees"; and (c) made implied threats of lower wages if employees selected the Union by distributing the document titled, "Cinelease personal guarantees."[25]

The legal standards set forth above with regard to threats apply here.

a. Alleged threat of discipline

The General Counsel and the Union contend that Ortiz's comment about an attendance policy, as recalled by Tolentino, constituted a threat. Specifically, Tolentino testified:

> Well, one of the things that I remember and important things for me and my co-workers was the manager, Steve Ortiz, he did like a gesture with his hands, and Jorge, the interpreter, the -- they will be hand ties in case the Union will be part of the Cinelease, because if the employees -- the good employees accumulated eight points, they will be fired and they won't be able to do anything for us to stay in Cinelease.

For the following reasons, I do not believe this constitutes a threat.

First, Tolentino's testimony is not very clear regarding what precisely Ortiz said or the context in which he conveyed the attendance point system. No other warehouse employees testified that they believed Ortiz told them they would have an 8-point attendance system if the Union won the election. This leads me to infer that they did not hear Ortiz's message the same way Tolentino did. Unlike Casillas, Ortiz testified his comments were from a PowerPoint that he prepared and presented to the employees.[26] That PowerPoint contains a slide that states, "Once a contract is in place, OUR HANDS WILL BE TIED." The same slide also states, "Cinelease will negotiate in good faith." (CP Exh. 5.) Absent some sort of context for the comment Tolentino described, it is impossible to tell whether Ortiz phrased in in terms of what may happen in bargaining, as opposed to a *fait accompli* if the Union won the election.

Based on the foregoing, I find the General Counsel has not met his burden to establish that Ortiz told employees they would have an 8-point attendance system if the Union was elected, and I therefore recommend dismissal of this complaint allegation.

b. Implied threats of job loss and lower wages—Cinelease Personal Guarantees

As detailed above, the Respondent disseminated the handout "Cinelease Personal Guarantees" at the meeting its managers held the day before the election. The General Counsel argues the following provisions constitute threats:

[25] The Charging Party argues that Ortiz solicited grievances and promised to resolve them. (R Br. 45–46.) This was not alleged by the General Counsel, it was not fully litigated, and I therefore do not consider it. *GTE Automatic Electric*, 196 NLRB 902, 903 (1972).

[26] The General Counsel contends that Ortiz did not rebut Tolentino's testimony. Ortiz testified, however, that he followed his PowerPoint presentation. (Tr. 510.) Given the relatively unclear nature of Tolentino's testimony, I do not find the failure to specifically question Ortiz about it warrants an adverse inference.

> The NLRB says we cannot make unlawful promises to you during the certification campaign. However, in response to your questions and comments, **we are allowed to assure you that remaining union-free will not cause you to lose what you currently enjoy**.
>
> Cinelease makes the following personal guarantees to employees voting in the upcoming NLRB conducted certification election. If the Cinelease Warehouse workers remain union free.
>
> 1. **Cinelease guarantees that you will not lose your job because you decide to stay union-free.**
> …
>
> 5. **Cinelease guarantees that you will not have your existing pay rates reduced because you decide to stay union-free.**

(GC Br. 34–35, emphasis supplied by the General Counsel.)

Unlike the PowerPoint, the handout did not state that Cinelease would negotiate in good faith or convey anything else regarding how it would act if the Union won the election. Importantly, the notarized handout was the only document distributed to the employees at the meeting—it is the document they took with them the day before the election. The implied threat is clear: If Cinelease remains free from the constraints of the Union, no harm will come to the employees. See *Phelps Dodge Mining Co*. , 308 NLRB 985, 9 (1992)("[B]y using the inherently sweeping expression, 'union-free,' the Respondent necessarily invited quite the opposite inference—that nothing short of full 'freedom' from all 'union entanglements'" would render employees eligible for a benefit).

The "guarantee" to each employee that he will not lose his job because he decides to stay union-free, if not to imply what will happen otherwise, makes no sense. It is both empty and illusory. Why would employees lose their jobs because they decide to stay union-free? The same question applies to the "guarantee" of no reduction in pay.[27] There is simply no point to promising employees retention of their jobs and maintenance of the status quo with regard to pay for remaining "union-free" if not to insinuate that things could be worse if the employees decide to encumber themselves with the Union.

The Respondent contends that the allegedly threatening statements merely convey that employees will not lose their jobs and pay rates will not be reduced if Cinelease remains nonunion, and there is no basis to infer that the opposite will happen if the Union prevails. The Respondent points to language stating, that Cinelease "guarantees that no matter what the union or its supporters may have said, no employee will be **disciplined or terminated for supporting the union by: signing a union authorization card, attending union meetings, or expressing support for the union**. (R Br. 23, emphasis supplied by the Respondent). What the Respondent does not point out, however, is that this "guarantee", along with all the others, is expressly

[27] The message and effect are essentially the same as promising benefits in exchange for remaining nonunion.

conditioned on Cinelease remaining union-free. It is the second of five enumerated item following the phrase "If the Cinelease warehouse workers remain union-free". (GC Exh. 6.)

The Respondent points to *Aliante Station Casino*, 358 NLRB 1556 (2012), and *Gallup Inc*., 349 NLRB 1213 (2007), for support. The communications at issue in those cases, however, did not contain promises or guarantees of regarding the employer's intended actions should the union not prevail. The Respondent also relies on *Divi Carina Bay Resort*, 356 NLRB 316, 319 (2010), where the Board agreed with the judge's determination that a supervisor's statement in a one-on-one meeting with an employee that "everything w[ould] be all right" if the employee voted "for the hotel," was determined to be "a simple statement of [the supervisor's] opinion regarding the advisability of rejecting union representation." The "Cinelease Personal Guarantees" are much more than one person's simple verbal statement of opinion.

Particularly in the context of the other unfair labor practices found herein, I find the General Counsel has met his burden to prove the "Cinelease Personal Guarantees" handout was coercive in violation of Section 8(a)(1). See *Reno Hilton Resorts Corp*., 319 NLRB 1154 (1995).

5. Rechecking Work Authorization Documents

Complaint paragraphs 6 and 17 allege that the Respondent violated Section 8(a)(1) of the Act when, on December 4 and 7, 2015, the Peiris and Mendoza told employees they were rechecking work authorization documents, they rechecked employees' work authorization documents, and required employees to provide additional documentation of their work authorizations.

It is a violation of Section 8(a)(1) to threaten employees that engaging in protected activity will lead to scrutiny of their immigration status. *Labriola Baking Co*., 361 NLRB No. 41, citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). This is the case even if employees are not undocumented. As the Board has stated:

> It is irrelevant to our analysis whether any of the employees in fact were themselves undocumented or had immigration-related problems. As one court of appeals has explained, even documented workers may be intimidated by threatened scrutiny of their immigration status, for they "may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding." *Rivera v. NIBCO, Inc*., 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied 544 U.S. 905 (2005).

Labriola Baking Co., at fn. 7.

Normally, asking employees to periodically provide paperwork to show they are eligible to work in the United States is not only lawful, but is required by immigration law. When an employer requests employment documentation in retaliation for union or protected activity, however, the employer discourages union or concerted activity in violation of Section 8(a)(1). See *North Hills Office Services*, 344 NLRB 1083 (2005); *Victor's Café 52, Inc*., 321 NLRB 504,

514-514 (1996); *Del Rey Tortilleria, Inc.*, 272 NLRB 1106 (1984). I therefore must determine whether the documentation was requested as a normal record-keeping matter or was requested in retaliation for employees' union activity.[28] See *Nortech Waste*, 336 NLRB 554 (2001).

It is patently clear the documentation was not requested as part of the Respondent's ordinary practice of record-keeping. It is undisputed that, as of at least 2013, Cinelease had no ordinary practice of rechecking work authorizations. The evidence also shows that the large-scale work authorization recheck that took place on December 4 and 7 was unprecedented at Cinelease. (Tr. 350–351, 523–524.)

Moreover, I find there is ample evidence of retaliatory motivation. To begin with, the logical first step following Saldana telling Mendoza (and presumably Casillas) he thought Martinez' work authorization documentation had expired would have been to check to see if Martinez had valid work authorization documents on file. To launch a corporate-wide audit before even seeing if Saldana was acting on accurate information defies basic common sense. This is particularly true given that Saldana was motivated by anger at Martinez for his support of the Union. In addition, the Respondent admittedly knew the effect such an undertaking would have on employees less than two weeks before the election. (Tr. 509–510). See *Labriola Baking Co.*, supra at 2–3 ("[E]mployer threats touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees.")

The testimony about how the audit came about conflicts in certain important aspects. Ortiz and Mendoza's account of what prompted the corporate-wide audit does not square with New's testimony. Both Ortiz and Mendoza recounted an unbroken chain of events that started with Saldana's report about Martinez, and ended with the phone call during which Pegula advised them to conduct the full scale audit. This was done prior to checking whether Martinez' documents had in fact expired and prior to any investigation. According to New, however, the advice to conduct the audit occurred after she was contacted by Dolinko on Pegula's behalf regarding how to proceed, which was prompted by the discovery that no procedure was in place. As Ortiz was unaware that there was no procure in place at the time Saldana reported Martinez' documents were expired, this discovery could only have occurred after an investigation into Saldana's claim. Johnson's testimony, however, indicates that Ortiz learned there was no process in place for rechecking work authorizations when he met with Stepanyan to instruct her to conduct the audit following advice from counsel.

There is also conflicting evidence about the call to Pegula. Mendoza testified that Pegula gave the advice to conduct the audit during their initial call. (Tr. 315.) According to Johnson, she and Ortiz called Pegula from the small conference room, but it was not until a later conversation that Pegula instructed her to conduct the audit. (Tr. 465–466.) In addition, Ortiz'

[28] This allegation is analyzed as a Section 8(a)(1) threat, as this is how it is framed in the complaint. Motivation, however, is a factor when analyzing the legitimacy of work authorization rechecks. To the extent *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983), applies, I find the General Counsel has established a prima facie case based on knowledge of the union organizing campaign and the evidence of retaliatory motivation discussed herein. I also find, for the reasons detailed below, that the Respondent has not met its burden to show it would have undertaken the rechecks in the manner it did absent the impending election.

account of how he learned about the report of a potential problem with an employee's work authorization documentation differs from both Mendoza's and Johnson's, as detailed in the statement of facts.

The attempts to scapegoat Stepanyan also raise red flags. Stepanyan started in 2013, but the evidence shows Tolentino, who began working for Cinelease in 2006, worked with expired papers in March 2012. (Tr. 112–113.) Moreover, his documents expired every 18 months, yet he was only asked to update them twice before, in 2007 and 2011. Nelson Monge's paperwork expired in 2007 and Alfredo Morales-Hernandez' expired in 2008. (R Exh. 3.) Stepanyan, the individual charged with maintaining the immigration paperwork, was not called to testify, and no other witnesses shed light on these lapses that pre-dated her employment.

Peiris' presence at the recheck meetings, when considered with the other evidence, also is telling. She was not consistently present at Cinelease other than during the campaign. During November and December 2015, she was present 2–3 times a week because she attended all of the meetings Casillas conducted to persuade employees not to vote for the Union.

Significantly, the Respondent's purported rationale that it was attempting to comply with IRCA does not withstand scrutiny. As the Charging Party points out, most of the employees the Respondent rechecked were permanent residents, or "green card" holders, and it violated immigration law to re-verify their status.[29] 8 U.S.C. § 1324b(a)(6); 28 C.F.R. § 44.200(a)(3)(i)(A). (Tr. 399–400.) The Respondent's claim that this information was never conveyed to the individuals conducting the audit is unconvincing. First, if the intention was to truly comply with immigration law, the basic information about how to go about this in a lawful manner would have been conveyed. In fact, New did advise that not all documentation needed to be re-verified, yet apparently this was not seen as important. Moreover, it strains credibility that human resources professionals Peiris and Stepanyan lacked this basic knowledge, which, as the Charging Party points out, is readily apparent to even the layperson on the instructions to the I-9 form. (CP Exh. 10.)

Fernandez, who was called in to provide updated documentation, had a permanent resident card on file that had an expiration date in 2021. He was not told there was a belief his card had expired, but was merely told Cinelease was updating his file and he needed to re-submit his papers. (Tr. 160, 167.) The day following his meeting with Peiris and Mendoza, Fernandez brought in the same documentation Cinelease already had on file. The Respondent's claim that its human resources employees did not know permanent resident cards could not be re-checked falls flat, as the evidence shows Fernandez' card did not expire for 6 more years. Even assuming this was a mistake, the action of making Fernandez resubmit his paperwork was coercive, as intent is not required to find a violation of Section 8(a)(1). Another anomaly is the fact that Robles, who had an expired work permit, was not called into the office for a recheck. Whether this was intentional or a mistake, it undermines any argument that diligent and accurate IRCA compliance was paramount.

The timeline of events also belies any assertion that the Respondent was merely complying with New's advice. Mendoza testified that he and Peiris began calling workers in at

[29] Of the 17 employees identified, 9 were permanent residents, or "green card" holders. (R Exh. 3.)

9:00 a.m. on December 4, 2015. Tolentino's recheck meeting took place at 1:00 p.m. on December 4. Yet, Johnson recalled that the phone call during which Pegula advised her to do the recheck took place a couple of hours after the initial 10:00 or 11:00 a.m. phone call on December 4. (Tr. 484–495.) After this phone call, which took place at around noon or 1:00, Ortiz instructed Stepanyan to go through the files of Cinelease's 165 employees to determine whose work authorizations had expired. After that, she created a spreadsheet for Peiris and Mendoza. (CP Exh. 7.) Even if Mendoza was mistaken that he began rechecking employees' authorizations at 9:00 in the morning, it is virtually impossible to see how Stepanyan could have gathered, compiled, and transmitted the information from all of the employees' files in time for Tolentino's 1:00 meeting.

Moreover, the haste with which the Respondent conducted the rechecks indicates unlawful intent. The rushed process, given that no rechecks had been conducted for years, establishes bad faith. This is highlighted by the fact that Stepanyan, who was responsible for this grave lapse that required immediate correction, faced no repercussions. (Tr. 526.) The evidence shows that the Respondent seized on Saldana's report about Martinez' work documents to hastily and coercively conduct a widespread audit. The factual scenario in the instant case is very similar to *Victor's Café 52*. 321 NLRB 504, 514 (1996). In that case, upper management learned that the individual responsible for checking work authorization documents had not been doing so when a comparison of card signatures to employee documents revealed a lapse in its procedures. Even though this provided a seemingly legitimate explanation the employer's actions of rechecking work documentation, the Board upheld the administrative law judge's determination that it was retaliatory based on timing, the presence of other unfair labor practices, and the fact that the employer had been lax about rechecking work documents in the past. See also *Impact Industries*, *Inc.*, 285 NLRB 5 (1987).

While the Respondent's concerns about IRCA compliance are unquestionably legitimate, the circumstances here lead me to conclude they were exploited to chill employee's union activity. See *Concrete Form Walls, Inc*., 346 NLRB 831, 835 (2006). Based on the foregoing, I find the General Counsel has met his burden to prove the Respondent threatened employees by telling them their work authorizations were being rechecked, by rechecking their work authorizations, and by requiring additional documentation of their work authorizations.

C. Section 8(a)(3) Allegation

Complaint paragraphs 10, 11, and 18 allege that the Respondent violated Section 8(a)(3) and (1) of the Act when, as a result of the rechecks, Hugo Martinez was placed on a leave of absence.

Section 8(a)(3) of the Act states that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), governs mixed-motive cases where discriminatory intent is alleged. To prove a violation under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. The elements commonly required to support this showing are union activity, employer knowledge of that activity, and

antiunion animus by the employer. *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001). If this is accomplished, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989).

I find the General Counsel has met the initial *Wright Line* burden. As noted above, the Respondent knew about the union organizing drive and the impending election. In addition, management knew that Martinez supported the Union, as Saldana reported this to Mendoza, and Mendoza had heard it.

Unlawful employer motivation may be established by circumstantial evidence, including among other things: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc*., 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc*., 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc*., 328 NLRB 1107 (1999)(statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999)(disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

The evidence regarding the rechecks of all employees, discussed above, applies to the allegation concerning Martinez. In addition, evidence specific to Martinez shows unlawful motivation. First, New advised that employees should be given a week to provide updated documentation. Martinez, however, was suspended on December 8, the day after the meeting where he was told to bring in updated documentation. The failure to follow New's advice is indicative of pretext.

Suspending Martinez after one day is also inconsistent with how Cinelease had acted in the past. When Fernandez was asked update his immigration paperwork in 2010 or 2011, he was unable to do so for one or two weeks, but was permitted to work in the interim. Likewise, when Cinelease asked Tolentino to update his immigration paperwork in 2007, he was permitted to bring it in the following week.

Mendoza's suggestion that Martinez return on December 18, the day following the election, to see what Cinelease could do to help him is highly suspicious, and can only be seen as an attempt to keep Martinez away from the workplace until after the election.[30]

[30] The fact that Martinez actually voted does not negate this inference.

Based on the foregoing, I find the General Counsel has made an initial showing sufficient to support the inference that Martinez' union activity was a motivating factor in its decision to recheck his work authorization and suspend him immediately. The burden therefore shifts to the Respondent to show the same actions would have taken place even absent Martinez' protected conduct.

Martinez' open support for the Union during one of Casillas' anti-union meetings started the whole chain of events leading to the rechecks and suspension. Specifically, Saldana was mad that Martinez showed support for the Union, so he decided to rat him out to Mendoza. As detailed above, this was seized upon in a rash manner, inconsistent with advice from immigration counsel and a deviation from past practice. Under these circumstances, I find the Respondent has failed to prove that the same conduct toward Martinez would have taken place absent his protected conduct of voicing support for the Union.

The Respondent cites to *International Baking*, 348 NLRB 1133 (2006), to support its indefinite suspension of Martinez. In that case, however, the human resources director, Irma Elioff, as part of a monthly tickler system that alerted the employer when employees' work documents were about to expire, discovered an error in the country of origin listed on employee Maria Zarco's work papers. When she brought it to Zarco's attention, Zarco said that she had "fixed" her papers to show the wrong country of origin. Elioff told Zarco not to say anything more that would require her termination. She suspended Zarco and told her to come back the following week with a letter from the Immigration and Naturalization Service (INS) correcting the error. Zarco did not provide the letter, and was subsequently terminated. In upholding the termination, the Board found significant that the error "was discovered in the regular course of Elioff's practice of reviewing work permits" and that the employer "consistently maintained a system to review work permits that were due to expire." No such regular system was maintained in the instant case, and Martinez did not admittedly submit fraudulent documentation like Zarco did in *International Baking*.

I agree with the Respondent, however, that after a reasonable time for Martinez to provide documentation, it had a duty to comply with immigration law and require Martinez to submit work authorization papers as a condition of continued employment. This may be addressed in the compliance phase. See *Rogan Brothers Sanitation*, 357 NLRB 1655, 1658 fn. 4 (2011); *Farm Fresh, Target 1*, LLC, 361 NLRB No. 83 (2014).

D. Request for Bargaining Order

The complaint, at paragraphs 12–16, requests a bargaining order.

The purpose of a remedial bargaining order is "to remedy past election damage [and] deter future misconduct." *Gissel*, supra. The Supreme Court has sanctioned the issuance of such a bargaining order "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the union's majority. . . ." *Gissel*, 395 U.S. at 610; see also *NLRB v. Katz*, 369 U.S. 736, 748, (1962). The Board thus has the authority to order an employer to recognize and bargain with a union even if the employees have not voted for union representation in an election.

The Supreme Court in *Gissel* identified two categories of employer misconduct that may implicate a bargaining order. "Category I" cases involve outrageous and pervasive unfair labor practices that make a fair election impossible. "Category II" cases involve less extraordinary and less pervasive unfair labor practices, which have nonetheless undermined majority union support, once expressed through authorization cards, rendering the possibility of a fair election slight. See *Register Guard*, 344 NLRB 1142, 1146 (2005); *Milum Textile Services*, 357 NLRB 2047, 2057 (2011); *Scott ex rel. NLRB v. Stephen Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001). In cases of "minor or less extensive unfair labor practices," a bargaining order is not justified. *Gissel*, supra at 615. These are commonly referred to as "Category III" cases.

I find the instant case falls squarely within Category II. As the Court declared in *Gissel*, at 614:

> The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

In the instant case, the General Counsel submitted evidence of majority support for the Union in the form of 22 signed authorization cards. Each card clearly states that by signing it, the employee is authorizing the Union as his representative. The Respondent attempted to show that some of these authorization cards may have been coerced. I am unconvinced that any individual signed a card against his free will. The employees who testified about the behavior directed at them did not sign cards, and there is no evidence whatsoever that anyone who did sign a card was pressured to do so.

The testimony of many employees shows that the Union once had broad and enthusiastic support which eroded due to an atmosphere of fear following the Respondent's coercive conduct, particularly the immigration status rechecks. I find that the possibility of erasing the effects of the coercive conduct and ensuring a fair election is slight, and that the employee sentiment once expressed through cards is better protected by a bargaining order.

First, the evidence shows that the work authorization rechecks caused widespread trepidation among employees, even those without immigration status concerns.[31] See *Novelis Corp*., 364 NLRB No. 101, slip op. at 45 (2016)(widely disseminated conduct supports bargaining order). As noted by the Board in *Labriola Baking,* supra at 2–3, immigration-related threats "are among the most likely to instill fear among employees." See also *Viracon, Inc*., 256

[31] A single employee testified he did not know about the rechecks. This is in contrast to multiple employees describing their knowledge of the rechecks and the effect on employees.

NLRB 245, 247 (1981) ("fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part."). Credible and unrefuted testimony demonstrated that employees viewed the corporate-wide recheck as a way to get rid of union supporters. Tolentino, Robles, and Nava believed Cinelease was requesting documentation in reprisal for workers' union activity, and worried they would be let go for any mistake. Even Flores, who is a United States citizen, felt scared, and he asked Barazza if the election could be postponed because he and his coworkers were scared.

Next, the hasty removal of Martinez from the workplace, a hallmark violation, is not likely to be forgotten by employees. *Michael's Painting, Inc*., 337 NLRB 860, 861 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004). Martinez' abrupt departure caused Tolentino to cease talking to coworkers about the Union anymore because he was fearful, and caused other employees to fear termination. This effect is unlikely to be dissipated considering the small size of the bargaining unit along with evidence showing knowledge of Martinez' removal quickly spread through the warehouse. Moreover, employees were not given contemporaneous or after-the-fact assurances that the rechecks and Martinez' removal from the workplace were unrelated to the union campaign and election.

In addition to the immigration-related conduct, this case includes the hallmark violation of a threat of job loss from the highest level official at Cinelease, as well as the manager of the warehouse and the director of sales. The "Cinelease Personal Guarantees" notarized document distributed to employees the day before the election directly tells employees that they will retain their jobs if they remain "union free." As I have found above, the statement "Cinelease guarantees that you will not lose your job because you decide to stay union-free" is a coercive threat.

The Respondent points to *Hialeah Hospital*, 343 NLRB 391 (2004), and *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004), to support its argument that a bargaining order is not warranted. Those cases, however, did not involve any immigration-related coercion, which I find, when considered along with the hallmark violations and other violations, tips the balance in favor of a bargaining order.

The Respondent also argues that the conduct here was not as severe as in *Michael's Painting, Inc.* supra, and *Concrete Form Walls, Inc*., supra, where bargaining orders were issued. There are a myriad of scenarios which could be compared to the instant case in support of arguments both for and against a bargaining order.[32] In sum, I find that the hallmark violations, the pervasiveness of the immigration-related conduct in the context of an immigrant work force, and the other violations, along with the relatively small workforce and other factors discussed herein, warrant a bargaining order.

[32] As former Chairman Miller observed in his dissenting opinion in *General Stencils*, 195 NLRB 1109, 1111 (1972) "No recent decisional task has more perplexed this Board, or confounded the courts which review our decisions, than that committed to us in *Gissel*: To determine whether an order to bargain is an appropriate remedy for employer interference with rights protected by Section 7 of the Act." (Footnote omitted).

CONCLUSIONS OF LAW

By rechecking employees' work authorization documents and telling employees they were doing so; requiring employees to provide additional work authorization documentation; interrogating employees about whether anyone from the Union had approached them; soliciting complaints and grievances and promising increased benefits and improved terms and conditions of employment if they refrained from organizational activity; threatening employees with discipline/termination if they supported the Union; and making implied threats of job loss and lower wages by distributing a document entitled "Cinelease personal guarantees", the Respondent has violated Section 8(a)(1) of the Act.

By removing Hugo Martinez from the workplace after providing him with only one day to provide documentation of his work authorization status, the Respondent has violated Section 8(a)(3) and (1) of the Act.

By the above conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent did not otherwise engage in any other unfair labor practices alleged in the consolidated complaints in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having rechecked employee work authorizations, told employees they were rechecking work authorizations, and required employees to provide additional work authorization documentation in a manner that interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent will be ordered to cease and desist from this action.

Having interrogated employee Jose Fernando Tolentino Chavez by asking if he had been approached by the Union, the Respondent will be ordered to cease and desist from this action.

Having solicited complaints and grievances and promising increased benefits and improved terms and conditions of employment if employees refrained from organizational activity, the Respondent will be ordered to cease and desist from this action.

Having threatened employees with discipline/termination if they supported the Union, the Respondent will be ordered to cease and desist from this action.

Having made implied threats of job loss and lower wages by distributing a document entitled "Cinelease Personal Guarantees", the Respondent will be ordered to cease and desist from this action, and to issue written rescission of the document.

Having removed employee Hugo Martinez from the workplace after providing him with only one day to provide documentation of his work authorization status, the Respondent will be ordered to offer him conditional reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, provided that he complete, within a reasonable time, USCIS Form 1-9, including the presentation of the appropriate documents, in order to allow Respondent to meet its obligations under the Immigration Reform and Control Act. *Mezanos Maven Bakery*, Inc., 362 NLRB No. 41, slip op. at 4 (2015).[33]

In light of my finding above that a *Gissel* bargaining-order is appropriate, the Respondent will be ordered to, on request, bargain with the Studio Transportation Drivers, Local 399 of the International Brotherhood of Teamsters as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment.

I will order that the Employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). The notice will be posted in both English and Spanish. In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id., slip op. at 3.

The General Counsel has requested that the notice be read aloud by Peiris in the presence of a Board agent. The Board has required that notices be read aloud by high-ranking officials or a Board agent when numerous serious unfair labor practices have been were committed by high-ranking management officials. *Allied Medical Transport, Inc*., supra. at 6 fn. 9 (2014). When unfair labor practices are severe and widespread, having the notice read aloud to employees allows them to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007). I find the General Counsel has established that this remedy is required to enable employees to exercise their Section 7 rights free from coercion. As Peiris is no longer employed by the Respondent and resides outside of the United States, the Respondent will be ordered to have the notice read aloud by a Board agent in the presence of a high-ranking management official. The notice will be read in both English and Spanish, or read in English and translated into Spanish.

Finally, the General Counsel requests an order requiring its employees undergo a training regarding Employees' Rights Under the Act, conducted by a Board Agent during paid work time. The Respondent offers no argument against this remedy in its posthearing brief, though it was given notice in the complaint that the General Counsel intended to seek it. The Board has stated, however, that a remedy that has not been issued in the past should not be granted in individual cases in the absence of a full briefing. *Consumer Products Services*, LLC, 357 NLRB No. 87,

[33] The Respondent correctly contends that Martinez was never removed from his position, but merely placed on a leave of absence. Any impact this may have on Martinez' physical reinstatement and any backpay and other benefits owed, should he be able to provide work authorization documentation, will be sorted out in the compliance phase.

slip op. at 2 fn. 3 (2011). As the General Counsel did not request such briefing, and permitting it would result in an undue delay, the General Counsel's request is denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Cinelease, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Rechecking employees' work authorization documents and telling employees they are doing so in a manner that interferes with, restrains, and coerces employees in the exercise of the rights guaranteed in Section 7 of the Act;

(b) Requiring employees to provide additional work authorization documentation in a manner that interferes with, restrains, and coerces employees in the exercise of the rights guaranteed in Section 7 of the Act;

(c) Interrogating employees about whether anyone from the Union has approached them;

(d) Soliciting complaints and grievances and promising increased benefits and improved terms and conditions of employment if they refrain from organizational activity;

(e) Threatening employees with discipline/termination if they support the Union;

(f) Making implied threats of job loss and lower wages by distributing a document entitled "Cinelease personal guarantees"

(g) Removing employees from the workplace after giving them only one day to provide documentation of their authorization to work in the United States;

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the "Cinelease Personal Guarantees" document in writing;

(b) On request, bargain with the Studio Transportation Drivers, Local 399 of the International Brotherhood of Teamsters as the exclusive collective-bargaining

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time warehouse employees, including lighting technicians, grips, repair employees, HMI employees, electric employees, cable employees, Kino employees, personal cages keepers, and expendables employees, employed by the Employer at its facility located at 5375 West San Fernando Road, Los Angeles, California 90039.
>
> Excluded: All other employees, office clerical employees, including rental and sales clerical employees, confidential employees, custodians, drivers, dispatchers, managerial employees, foremen, employees of a temporary agency, and guards and supervisors as defined in the Act.

(c) Within 14 days of the date of the Board's Order, offer reinstatement to Hugo Martinez conditioned upon his completion, within a reasonable time, of USCIS Form 1-9, including the presentation of the appropriate documents, in order to allow Respondent to meet its obligations under the Immigration Reform and Control Act.

(d) Within 14 days of the date of the Board's Order, rescind from its files any references to the unlawful removal of Hugo Martinez from the workplace the day after he was told to update his work authorization documentation, and notify him this has been done and will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay that may be due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix"[35] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

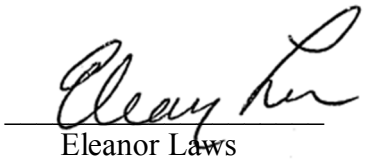
any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2015.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the warehouse employees by a Board agent in the presence of a high-ranking management official. The notice will be read in both English and Spanish, or read in English and translated into Spanish.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., July 19, 2017.



Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT recheck your work authorizations and tell you we are rechecking work authorizations, in a manner that interferes with, restrains, and coerces you in your exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT require you to provide additional work authorization documentation in a manner that interferes with, restrains, and coerces you in your exercise of the rights guaranteed in Section 7 of the Act.

WE WILL NOT interrogate you about whether you have been approached by the Union.

WE WILL NOT solicit complaints and grievances and promise increased benefits and improved terms and conditions of employment if you refrain from organizational activity.

WE WILL NOT threaten you with discipline/termination if you support the Union.

WE WILL NOT make implied threats of job loss and lower wages.

WE WILL NOT removing you from the workplace after giving you only one day to provide documentation of your authorization to work in the United States.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Included: All full-time and regular part-time warehouse employees, including lighting technicians, grips, repair employees, HMI employees, electric employees, cable employees, Kino employees, personal cages keepers, and expendables employees,

employed by the Employer at its facility located at 5375 West San Fernando Road, Los Angeles, California 90039.

Excluded: All other employees, office clerical employees, including rental and sales clerical employees, confidential employees, custodians, drivers, dispatchers, managerial employees, foremen, employees of a temporary agency, and guards and supervisors as defined in the Act.

WE WILL provide you with written rescission of the "Cinelease Personal Guarantees" document.

WE WILL within 14 days of the date of the Board's Order, offer reinstatement to Hugo Martinez conditioned upon his completion, within a reasonable time, of USCIS Form 1-9, including the presentation of the appropriate documents, in order to allow Respondent to meet its obligations under the Immigration Reform and Control Act

WE WILL within 14 days of the date of the Board's Order, rescind from its files any references to the unlawful removal of Hugo Martinez from the workplace the day after he was told to update his work authorization documentation, and notify him this has been done and will not be used against him in any way

CINELEASE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-166005 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.